Office - Supreme Court, U. S.
FILED
AUG 15 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 308

IN THE MATTER OF V-I-D, INC.,

Debtor,

KELLEY, GLOVER & VALE, INC., TRUSTEE,

Appellant-Petitioner,

vs.

McM. COFFING, Trustee, GEORGE MICHAELY, Successor Indenture-Trustee, CHARLES J. KRAMER and HELEN E. KRAMER, Indenture Bondholders,

Appellees-Respondents.

Brief of Respondents Resisting Certiorari.

ALBERT H. GAVIT,
504 Broadway,
Gary, Indiana,
As attorney for Respondent,
McM. Coffing, Trustee.

JOHN W. LYDDICK,
504 Broadway,
Gary, Indiana,
As attorney for Remaining
Respondents.

INDEX.

	PAGE
Opinions Below	1
The Matter of Jurisdiction	3
Questions Presented for Review	3
Argument	5
Conclusion	11

Citations

Cases:

De Melle v. U. C. C. (Me.) 213 F. 2nd 219, cert. den. 350 U.S.C. 824	9
Granada Apartments, In re, (7 Cir.) 155 F. 2nd 882	9
Independent Nail and Packing Co. v. Stronghold Screw Products (7th Cir.) 215 F. 2nd 434, 438	9
Michigan-Ohio Bldg. Corp. (7 Cir.) 117 F. 2nd 191	11
Von Kezlow Realty Co., In re, (Mich.) 116 F. 2nd 673	9
Wilson v. Kiesel (1896) 164 U.S. 248	9
620 Church Street Corp. et al, In the Matter of, 299 U.S. 24	11

Statutes:

11 U.S.C. 48	3
18 U.S.C. 155	4
11 U.S.C. 650	3, 11, 18

Texts:

Cyc. Fed. Pro. 3rd Ed. Vol. 13, page 314	9

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 308

IN THE MATTER OF V I D, INC.,

Debtor.

KELLEY, GLOVER & VALE, INC., TRUSTEE,

Appellant-Petitioner,

vs.

McM. COFFING, Trustee, GEORGE MICHAELY, Successor Indenture Trustee, CHARLES J. KRAMER and HELEN E. KRAMER, Indenture Bondholders,

Appellees-Respondents.

Brief of Respondents Resisting Certiorari.

Opinions Below.

Since 1939, V-I-D has been in reorganization proceedings in the District Court. (p. 30 cert. pet.) All reorganization attempts have been plagued by appeals by the present Glover group.

In re V-I-D, Inc., 158 F. 2nd 964 cert. denied 331 U.S. 829;

In re V-I-D, Inc., 177 F. 2nd 234 cert. denied 339 U.S. 904;

In re V-I-D, Inc. 198 F. 2nd 392, cert. denied 344 U. S. 914;

In re V-I-D, Inc. 226 F. 2nd 113, cert. denied 350 U. S. 968, rehearing denied 351 U. S. 915.

Finally, matters developed to the point of final adjudications that the Glover group were a "no value" claimant with no participation under the approved and confirmed reorganization plan.

Then, and only then, the District Court proceeded with applications for fees. It fixed a time for their filing and a time for objections to them. The Glover group neither filed objections to any fee claim, nor did it enter an appearance to any of them. It ignored the fee hearings but just within the statutory limitation for an appeal undertook to appeal to the Court of Appeals for the Seventh Circuit from the allowances.

It was there met by motions to dismiss for lack of an appealable interest and for failure to have any appeal "allowed".

Those motions to dismiss were sustained, (243 F. 2nd 566), because the Glover group was not an "aggrieved party" and had been adjudged to lack that attribute in 226 F. 2nd 113.

From that sustaining of those motions to dismiss, certiorari is here sought.

The Matter of Jurisdiction.

Petitioner here asserts

> "jurisdiction is invoked under 24 U.S.C. 1254 and 2101".

Those sections provide only what may be appealed—not who may appeal.

Another section, 11 U.S.C. 48 governs who may appeal. It limits that privilege to an "aggrieved party"—a requirement petitioner cannot meet.

Additionally, by 11 U.S.C. 650, even an "aggrieved party" may appeal from fee allowances only if the appeal be "allowed" by the Court of Appeals. No such allowance was ever here sought or procured.

For the foregoing, and other reasons hereinafter given, no jurisdiction of this tribunal is here invoked.

"Questions Presented for Review."

Petitioner poses as the questions here presented whether a Court of Appeals should ratify alleged maladministration in the District Court in allowing illegal and collusive fees on the ground that the complaining party lacks a pecuniary interest.

No such question is presented. The Court of Appeals ratified nothing. It affirmed nothing. It approved nothing. On the contrary, by dismissing the appeal, it merely decided that no question of ratification or affirmance or approval of anything was before it. Further, as even petitioner admits (p. 33 cert. pet.) the District Court approved no agreements, collusive or otherwise, with

respect to fees, but on the contrary, tried the matters on evidence.

To say the least, to present any question of alleged "maladministration" by the District Court a record would have to be filed in this tribunal showing the presence of that question. Here, however, petitioner by way of an alleged record, submits only that it made that charge in an unverified "brief" filed in the Court of Appeals (pp. 31-33 cert. pet.).

Accordingly, all other reasons apart, petitioner's "Questions Presented For Review" are patently nonexistent. They are both unsupported and unsupportable by any record, here or elsewhere.

If they existed of record, something approaching a record would have been filed here to support the claim of their existence and that there here was a violation of 18 U.S.C. 155 with its prohibition against fee fixing by agreement.

Obviously, its prohibitions in no way preclude any party in interest conceding *after* services are rendered its views of what would be a reasonable fee and its position that a fee of not to exceed those views is not opposed.

Argument.

Petitioner's argument is

I.

That its charges "deserve consideration" by the Court of Appeals, regardless of its "technical appealable interest" and

II.

That in any event it does have a statutory appealable interest. Of these, in their order:

I.

Appeals—at least in civil proceedings—exist only pursuant to statute or court rule. Interlopers, no matter if they be well intentioned, cannot take charge of litigation either in a trial tribunal or a reviewing one where they have no interest.

Accordingly, until and unless petitioner can point to some statute or court rule granting it a right of appeal, no "deserved consideration" test can ever come into operation.

If, however, all statutes and rules as to appeals could somehow be disregarded and some "deserved consideration" test created, surely nothing in petitioner's conduct could invoke any such rule.

At least in this particular case, by final adjudication, it has been decided that it does not deserve consideration and that it is relegated to a permanent no interest or participation status.

In re V-I-D, Inc. 226 F. 2nd 113, cert. denied 350 U. S. 968 and rehearing denied 351 U. S. 915.

Most certainly, a litigant who will not abide such an adjudication against it creates no deserving consideration a situation where it thus flaunts and ignores a solemn judicial pronouncement against it. Rather, as to such a litigant, the circuit below was correct in characterizing its conduct as contumacious.

In re V-I-D, Inc. 177 F. 2nd 234.

Again, it would seem that to "deserve consideration" any sincere litigant would have appeared in the trial court to protect that court against possible "maladministration" and would have here filed pleadings tendering its contentions and adducing proof of its charges.

Here, however, petitioner concededly neither appeared nor took any part in the District Court that it here attacks. (p. 10 cert. pet.).

Next, to deserve consideration, a sincere litigant who met defeat in the District Court, would have gone to the Court of Appeals with Points on Appeal clearly raising the issue of collusion below. Here, however, those points (pp. 16-18 cert. pet.) fail even by inference to allege collusion.

Certainly, also, to deserve consideration the party seeking relief from the Court of Appeals would have met the minimum statutory requirement of 11 U. S. C. 50 of asking that court to allow the appeal.

If the Court of Appeals, with an adequate record before it, refused to allow the appeal, or if it did so, then refused on an adequate record and adequate Points on Appeal to correct "maladministration" by a judge of its circuit,

a deserving party in interest would have filed here the complete record from the Court of Appeals so that the record itself, rather than mere assertions of the petitioner, disclosed a case deserving consideration.

Additionally, to make a deserving consideration, that petitioner would offer such excuse, if any it had for the unjustified burdens as to time and expense that its course of conduct over the years placed on this trust.

By any test, nothing in this present phase of the proceeding or in the long history of it in the District Court, in the Court of Appeals and in this Court, does anything to show that petitioner has not already been given the maximum of consideration.

Unbroken precedent, as well as 11 U. S. C. 48, decides beyond argument that the only party on appeal who deserves consideration is a party who has been aggrieved, damaged, injured and prejudiced by the decision of which he complains.

Most certainly, petitioner can meet no such test with respect to fee allowances where even there were no allowances at all, it would receive nothing.

Petitioner can be no self-appointed supervisor of the operation of the courts below. That function, if it anywhere exists as to other than aggrieved parties, has been exclusively lodged by statute in Securities and Exchange Commission in reorganization proceedings.

Neither that Commission, nor the Kramers (first mortgage bond-holders), nor the first mortgage trustee, find any "maladministration."

Petitioner points to no conflict among the circuits nor any new or erroneous ruling announced below. It does hint of an alleged departure from accepted practice. How-

ever, none is shown. The District Court heard evidence and decided the case on the facts. The Court of Appeals ruled that only an "aggrieved party" may appeal. Any other treatment would have departed from accepted practice.

II.

Petitioner argues under II that in any event it does have a statutory appealable interest. In that contention it overrules an adjudication against it in this very case which adjudication decides the exact opposite.

In re V-1 D, Inc. 226 F. 2nd 113.

If, however, there were no such law of the case here present and no such final adjudication against the petitioner, 11 U. S. C. 48 with its permission of appeals only to an "aggrieved party" would preclude any appeal by petitioner as a conceded "no value" creditor in a reorganization proceeding.

If, however, petitioner met all tests of being an "aggrieved party," it would still be subject to the rules governing even such a party with respect to appeals. It cannot meet those tests because:

1. With respect to fee allowances in reorganization proceedings, no one, no matter how seriously he be prejudiced, thereby has any "right to appeal." By statute, there is no such right. On the contrary, such appeals are a matter of grace and are permitted only where they are "allowed" by the Court of Appeals.

11 U. S. C. 650.

Here, however, petitioner makes no claim that it ever sought to be "allowed" an appeal or that leave to do so was ever granted.

Such leave having never been granted even were this case remanded, dismissal of the appeal must still necessarily follow.

In re Granada Apartments (7th Cir.) 155 F. 2nd 882.

In re VonKezlow Realty Company (Mich.) 116 F. 2nd 673.

2. Petitioner concedes it attempted to by-pass the trial court by entering no appearance to the fee petitions and ignoring the hearings. (p. 10 cert. pet.). Its excuse is that appellees would have there contended it had "no right to be heard."

Expected opposition is no excuse for a default.

Independent Nail and Packing Co. v. Stronghold Screw Products (7th Cir.) 215 F. 2nd 434, 438.

and of course, a question not raised in the trial court cannot be presented on appeal.

DeMelio v. I. C. C. (Me.) 219 F. 2nd 219, cert. den. 350 U. S. 824.

Accordingly, were this case to be remanded to the Court of Appeals, no question is presented to it.

3. Fees were allowed in the District Court to Call, the Drapers, Gavit, and Coffing, as Trustee, (pp. 13-15 cert. pet.). Of them, only Coffing, as Trustee, is here as a party. The absence of the others precludes any review in this tribunal.

Wilson v. Kiesel (1896) 164 U. S. 248.

Cyc. Fed. Pro. 3d Edit. Vol. 13 p. 314 and cases there cited.

4. Whether the fee allowances were collusive involves a fact question.

It cannot be reached here or anywhere else without the evidence and there is here no record in that regard.

By way of so-called record (pp. 31-33 cert. pet. appendix) petitioner copies its brief below where, at the most it recited in unverified form certain alleged isolated colloquies during the taking of the evidence in the District Court.

The absence of the evidence is no oversight. It is entirely probable that were it here with the rest of the record it would conclusively show that at the hearings, Mr. Lyddick, as counsellor for the Kramers, and the first mortgage trustee, merely stated that if certain claims were reduced to certain amounts he would not oppose their allowance. Most certainly, counsel for anyone has at any time in any case not only the right but the affirmative duty of stating the position of his client.

Further, were the evidence and the record here, it is entirely probable it would show that while the District Court, after hearing the evidence, allowed the Draper claim in the amount Mr. Lyddick said was not objectionable to his clients, that it reduced the Call claim to a mere one-third of even Mr. Lyddick's views, and denied the Goldberg claim in toto notwithstanding Mr. Lyddick may have stated he did not oppose it to a certain amount.

As to the Gavit, and Coffing, as Trustee, claims, there is not even a hint in the so called record filed here that Mr. Lyddick for the Kramers or the first mortgage trustee, made any statement about them at all or that they were tried otherwise than as contested matters on verified petitions and objections filed by Mr. Lyddick for his clients.

5. Even if petitioner otherwise had the status to appeal, it could only urge alleged collusiveness in the Court of Appeals if its Points on Appeal tendered that question. Its Points make no mention of alleged collusiveness. (pp. 16-18 cert. pet.).

6. Even if all prior adjudications in this case were to be ignored, a "no value" claimant in a reorganization proceeding cannot appeal.

In the matter of 620 Church Street Corp. et al., 299 U. S. 24.

In re Michigan-Ohio Bldg. Corp. (7th Cir.) 117 F. 2nd 191.

Petitioner errs grievously in its assertion that nothing in a reorganization case attains judicative effect until the entire cause is finally closed.

Neither precedent nor statute permits this Glover group to gamble on court decisions and then ignore them, if dissatisfied.

Conclusion.

Denial of the present certiorari petition is prayed with such sanctions and costs as to this court is meet.

No matter how restrained and temperate be the approach to the present petition, it involves an abuse of